Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 04-261
Violent Television Programming	)	
And Its Impact on Children	)	

COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the Commission's Notice of Inquiry ("NOI") in the above captioned proceeding.

NCTA is the principal trade association of the cable television industry. NCTA's members include the operators of cable television systems serving more than 90% of the nation's cable television subscribers. NCTA also includes operators of more than 200 cable program networks, as well as companies that provide equipment and services to the industry.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission asks a set of questions regarding the ever-present concerns that parents, policy-makers and citizens have regarding the impact of violent television programming on children. This is a concern that all media whose material may be viewed by children should take seriously. And the cable television industry does.

Over the years, there have been many studies of the effects of violent material on children. It is nearly impossible to define with precision the types of "violent" programming that may have adverse effects, or to quantify or determine just what effects particular types of programming may have. However, research provides warning signals to responsible parents and

responsible media. The cable industry has taken substantial steps to enable parents to act on those warning signals to protect their children from programming that they deem worrisome – steps that implement and go beyond the measures adopted by Congress and the Commission to address the issue.

First, the ever-expanding multitude of program networks and services that cable operators and programmers provide give parents the opportunity to steer their children to an increasing amount of age-appropriate or all-age appropriate programming.

Second, cable operators and programmers have developed and make available a range of methods – including TV ratings, the V-chip and set-top devices – that help parents both *identify* programming that is appropriate (or inappropriate) for their children and enable them to *block* their children's access to programming that they do not want them to watch.

Third, for more than a decade, operators and programmers have worked to *educate* parents about how to take advantage of the choice of programming available to them and the technological tools for blocking programming that they deem inappropriate for their children.

These steps give parents the tools to determine whether programming available on cable systems is suitable for their family and to decide when and whether such programming may be viewed by their children. And they do so without censoring or restricting the content that adults may choose to watch or allow their children to watch, even if other adults choose not to allow such content into their homes. This is critically important, since violent content, notwithstanding its potential adverse effects on children, is not always (or even usually) wholly gratuitous and often arises in artistic expression or newsworthy material. Prohibiting censorship of such material lies at the core of constitutionally protected speech.

Nevertheless, as the NOI makes clear, some members of Congress have expressed concerns that these ways of giving parents the ability to control their children's access to violent content are not adequate. They have asked whether the Commission has authority – or should be given authority – to take matters out of parents' hands by prohibiting "excessively violent programming that is harmful to children" during the hours when children are likely to comprise a substantial part of the viewing audience.

The Commission does not have such authority. Nor is it necessary or appropriate – or constitutionally permissible – to impose such a "safe harbor" requirement on cable television operators and programmers. NCTA retained Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law at The University of Chicago, to examine the constitutional implications. His conclusion is unequivocal: "[A]ny direct regulation of violent themes and images on cable television would constitute a content-based regulation of high value speech in violation of the First Amendment."

In his paper, which is attached to these comments, Professor Stone acknowledges that the government has a legitimate interest in protecting the physical and psychological well-being of minors. But to be sufficiently compelling to justify content-based regulation of speech, that interest must be based on more concrete, conclusive and precise evidence of harm than currently exists. Moreover, even if the evidence were deemed to meet this standard, Professor Stone explains that it would be impossible to define what constitutes harmfully violent material with sufficient clarity to meet the requirement that content-based regulation of "high" value speech be "narrowly tailored" to serve their purpose.

And even if the definitional problems could somehow be overcome, relegating violent programming to a late-night "safe harbor" would still not pass First Amendment muster because it is not the "least restrictive" means of achieving the government's interest. Because cable customers have the means to detect and block programming that they deem excessively violent *at any hour of the day* – using blocking devices – the government may not impose a restriction that prevents adults from viewing certain programming except during late night hours.

I. CABLE OPERATORS AND PROGRAM NETWORKS PROVIDE PARENTS WITH THE ESSENTIAL TOOLS FOR PROTECTING THEIR CHILDREN FROM PROGRAMMING THAT THEY DEEM HARMFUL AND INAPPROPRIATE.

The cable industry has a longstanding commitment to addressing parents' concerns about what they and their children see on television. NCTA and individual cable operators and program networks are strongly committed to addressing these concerns.

Cable's approach to addressing indecency and violence on television is based on the concepts of *choice, control* and *education.* Cable provides the widest possible choice in television programming, including many channels that serve children and family viewers and provide educational, informative and entertaining programming at virtually any time of the day.

That choice is supplemented by technology that offers families a broad range of control over what programming can be displayed in the home. Analog and digital cable set-top boxes provide tools to block unwanted channels and programming, thus empowering families to manage content for their viewing. In addition, the cable industry supports the TV ratings system, which can be used in conjunction with V-chip-equipped television sets to block specific programming that parents deem inappropriate for their family.

For more than a decade, cable networks and operators have worked to educate viewers about how to take charge of the diverse content available to them on cable television. Since 1994, NCTA, Cable in the Classroom (CIC), the cable industry's education foundation, and the National PTA have collaborated on a national media literacy initiative designed to provide parents with simple and effective methods to critically examine media messages and make informed judgments about media use. The cable industry has also worked to develop and distribute informational materials to increase public awareness of the TV ratings and the V-chip. Most recently, the cable industry recommitted itself to educating consumers about parental control tools by launching a new outreach campaign called *"Cable Puts You in Control."* Finally, individual cable networks and operators have aired programming and developed pro-social initiatives designed to help communities, families and children deal with difficult issues, including violence in society.

A. Cable Gives Parents a Broad Choice of Age-Appropriate Viewing Options for Their Children.

Cable provides a wide array of programming aimed at diverse audiences, including many channels and programs that serve children and families. Cable networks such as Nickelodeon, Noggin, Discovery Kids, Disney Channel, and WAM! are 24-hour cable networks devoted solely to children. They provide hundreds of hours of high-quality, age-appropriate programming that educates, informs and entertains. For example, Noggin is a commercial-free educational channel dedicated to preschoolers twelve hours a day, seven days a week. Starting at 6 p.m., Noggin's nighttime block, The N, provides programming dedicated to issues affecting teens and pre-teens.

Discovery Kids, another cable network devoted to children, provides real-world entertainment to kids of all ages and interests. Discovery Kids became a household phenomenon

in 2002 with its launch on NBC's Saturday morning block. This year, TLC and Discovery Kids reinvigorated the award-winning "Ready Set Learn!," a three-hour weekday morning block of commercial-free programming for preschoolers that airs on these two cable networks.

In addition to these networks designed for children, cable provides an abundance of opportunities for the whole family to watch television together. For example, ABC Family features family favorites like *Full House* and *7th Heaven*, in addition to original series and movies. Hallmark Channel provides a diverse slate of high-quality original productions, programs from the Hallmark Entertainment library and the prestigious Hallmark Hall of Fame Collection, coupled with acquired family classics. National Geographic Channel, another network for the whole family, is a 24-hour cable network that offers a new realm of adventure, exploration, science and culture. These, and dozens of other examples of family-friendly programming, make cable a place for families to find appropriate fare any time of the day.

B. Cable Gives Parents the Opportunity to Control the Programming That is Viewable by Their Children.

The cable industry has been at the forefront of efforts to provide parents with tools to control and better manage the programming that comes into their homes. Analog and digital cable set-top boxes allow cable customers to block channels and specific programming they find unsuitable for their families. Additionally, the cable industry helped develop, and has actively supported, the TV ratings system, which provides information about the content of television programming and can be used with the V-chip and digital set top boxes to block unwanted programming.

1. Cable Set Top Boxes Provide Customers with Parental Controls.

Cable customers who want to block programming coming into their homes have several options. Most advanced analog boxes have the ability to block user-selected channels. If a

customer doesn't have such a box, cable operators will provide one upon request. Section 624(d)(2) of the Communications Act, in fact, requires that cable operators, upon request of a subscriber, provide such devices "by sale or lease."[1] But on March 23, 2004, as part of the industry's *"Cable Puts You in Control"* initiative, leading cable companies representing about 85 percent of all cable subscribers (including NCTA's 10 largest multiple system operator members) announced that they will make channel-blocking technology available upon request, *at no additional charge.*

Digital set-top boxes provided by cable operators and in use today have additional parental control capabilities. Although specific functionality of digital set-top boxes varies depending on manufacturer and model, typical features include the ability to block channels and specific programs, using a variety of subscriber-selected criteria. These criteria may include:

- Channel blocking – customers may select an individual channel or several channels they wish to block.
- Time and Date blocking – customers may select the date, time and channel they wish to block.
- TV Parental Guidelines blocking – customers may select the TV rating(s) they wish to block. If "TV-14" is selected, programs with this rating, regardless of the channel on which they air, will be blocked.
- MPAA Movie Ratings blocking – the customer selects the movie rating(s) they wish to block. All movies with this rating will be blocked, regardless of the channel on which they air.
- Adult Titles in Program Guide Listing blocking – the cable operator's electronic program guide includes the title of programs, including premium service and Video-On-Demand programs. Using the parental controls, a customer may "hide" adult titles that appear in the program guide.

[1] 47 U.S.C. § 544(d)(2).

2. TV Ratings and the V-chip Provide Additional Control.

Following enactment of the Telecommunications Act of 1996, the cable industry played a leadership role in developing and implementing the current system of TV Parental Guidelines – a voluntary system designed to give parents information about the content of television programs. Today, most television programs on cable and broadcast television carry a TV rating applied by cable and broadcast networks, and producers of programs. News and sports are exempt from the system. The guidelines are divided into ratings categories for programs designed for children: TV-Y (All Children) and TV-Y7 (Directed to Older Children – age 7 and older); and categories for programs designed for the entire audience: TV-G (General Audience), TV-PG (Parental Guidance Suggested), TV-14 (Parents Strongly Cautioned – may be unsuitable for children under 14) and TV-MA (Mature Audience Only – may be unsuitable for children under 17). The TV Parental Guidelines combine information about the age appropriateness of a program with specific information, where appropriate, about the content of the program (i.e., "FV" for fantasy violence in children's programming; "V" for violence, "S" for sexual content, "D" for suggestive dialogue, and "L" for strong language in programming designed for the entire audience).[2]

A program's rating appears in the upper left hand corner of the television screen at the beginning of the show. Cable networks and broadcast stations also encode the ratings information in their signal so it can be "read" by television sets equipped with the V-chip. Consumers can block shows with certain ratings by programming their V-chip-equipped TV sets using an on-screen menu of options. Shows can be blocked according to the TV Parental Guidelines or, when applicable, the Motion Picture Association of America's movie ratings.

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[2] Premium cable channels supplement the TV and movie ratings by applying additional content advisories to much of their programming.

Using the TV Parental Guidelines, parents can block shows according to the age-based categories (such as TV-14) or content labels (such as V for violence). All television sets with screens 13" or larger sold after January 1, 2000 contain V-chip technology. Well in excess of 80 million V-chip equipped TV sets have been sold to date.

Earlier this year, NCTA member cable networks reaffirmed their commitment to apply TV ratings and content labels to their programming, put the appropriate rating icon on-screen at the beginning of rated programs, and encode the ratings in programming so that they can be interpreted by a V-chip equipped television set.

A recent survey by the Kaiser Family Foundation shows that the TV ratings system helps parents make informed viewing choices for their families.[3] Almost 90 percent of parents who have used the TV ratings find them useful. Moreover, the vast majority (89 percent) of parents who have used the V-chip found it useful. While these numbers are encouraging, the Kaiser study also points out that not all parents are aware that these tools are available to them or understand how to use them. For this reason, the cable industry is committed to continuing its educational efforts in this area.

C. Cable Educates Parents on Tools To Manage Content.

The cable industry has developed and supported a variety of initiatives to help parents better manage and understand the television programming available to their families. The industry, in partnership with the National PTA, developed a media literacy initiative in 1994 and continues to develop new materials and avenues for disseminating this information to parents and schools. Following development of the TV ratings system in 1996, the cable industry joined children's and parent's advocacy groups to raise public awareness of the ratings system and the

[3] Parents, Media And Public Policy: A Kaiser Family Foundation Survey, Fall 2004.

V-chip. Building on these efforts, in March 2004 the cable industry launched a multifaceted consumer education initiative called "*Cable Puts You in Control.*" This initiative helps cable customers identify the wide array of programming options from which their families can choose and the many tools available to help them be responsible television viewers.

1. Media Literacy

For almost a decade, the National PTA, Cable in the Classroom (CIC), the cable industry's education foundation, and NCTA have been involved in a collaborative national media literacy initiative. Initially known as "*Taking Charge of Your TV,*" this initiative provides resources to parents and teachers in order to help families critically examine media messages and make informed judgments and decisions about media use. Parents learn how to get the most out of media while mitigating its potentially negative effects.

In the first phase of the project, more than 3,000 PTA and cable leaders were trained in the key elements of media literacy and how to conduct workshops for parents, educators and organizations in their communities. These workshops brought media literacy information to families and schools in communities across the country by providing simple and effective strategies to parents concerned about the content of some television programming. Tens of thousands of parents attended workshops in more than 40 states. The critical viewing project also developed several videos and a workbook to bring media literacy, other television viewing skills, and information to families and educators who could not attend a local workshop. Cable in the Classroom and NCTA distributed, free of charge, more than 300,000 copies of the workbook for parents and over 200,000 videos.

In the second, ongoing phase of this media literacy project, Cable in the Classroom collaborates with the National PTA and other partners to produce and distribute media literacy

materials to parents and teachers. Cable in the Classroom's website (www.ciconline.org) supports families with a variety of resources, including an online primer called Media Literacy 101 and streaming video clips. More than 10,000 copies of the primer have been downloaded from the CIC website. These materials are also available on the FCC's website for parents, Parents' Place (www.fcc.gov/parents).

In October 2002, Cable in the Classroom and the National PTA jointly commissioned *Thinking Critically About Media: Schools and Families in Partnership*. Written by six experts in media literacy, the report details the importance of teaching children to understand and analyze the media messages that bombard them daily, and the growing need for parents and teachers to arm children with media literacy skills. The report outlines useful strategies parents and schools can adopt to transform the passive hours children spend consuming media into hours spent enhancing their critical thinking skills while analyzing and challenging the messages they are taking in. More than 10,000 paper copies of *Thinking Critically About Media* have been distributed, and 25,000 copies have been downloaded from the CIC website.

Earlier this year, Cable in the Classroom and the National PTA released a new media literacy paper that provides guidance to parents on using media to support the development of young children aged 2-11.[4] Like its predecessor, this paper recognizes that media can provide helpful tools and teach valuable lessons to children, and that a consistent and developmentally appropriate approach, grounded in medial literacy strategies, can help parents to harness the best aspects of media for their children.

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[4] *See* "Families Should Develop Media Plan to Take Control of Media Usage: *New Report Offers 6-Point Strategy and Simple Techniques for Deciding What's Appropriate, When*," Press Release, Aril 2, 2004 (http://www.ncta.com/press/press.cfm?PRid=470&showArticles=ok).

2. TV Ratings and the V-Chip

Since the TV ratings system was developed in 1996, the cable industry has worked to develop and distribute informational materials to increase public awareness of the TV ratings and V-chip. NCTA has joined with other television industry organizations and interested advocacy groups on many of these projects.

In conjunction with the development of the TV Parental Guidelines, the television industry, led by NCTA, the National Association of Broadcasters (NAB), and the Motion Picture Association of America (MPAA), created a website with information about the TV ratings and V-chip (www.tvguidelines.org). Parents can download from the site a brochure called *"Navigating Your Way Through the TV Parental Guidelines and V-Chip,"* which describes the TV Parental Guidelines and answers many frequently asked questions about the ratings and the V-chip.

In another public education campaign, the cable industry joined the Kaiser Family Foundation and the Center for Media Education in promoting the *V-chip Education Project.* NCTA, NAB, and MPAA produced and widely distributed a series of public service announcements to raise awareness of the V-chip and to promote the availability of additional information.

These efforts have an historical foundation of industry attention to the issue of televised violence. In 1998, NCTA, in partnership with the nation's leading children's advocacy groups from the fields of health, education and child development, announced a public education effort to help parents understand and use the TV ratings system. Materials created as part of the campaign, *"Tools to Use to Help You Choose: A Family Guide to the TV Ratings System,"* included a video explaining each ratings category and content descriptor, a companion print

brochure, and a peel-off sticker for the remote control for quick reference to the TV ratings categories and content labels. More than 300,000 copies of the *Tools to Use to Help You Choose* materials have been distributed – free of charge – to parents, schools and organizations nationwide.

3. "Cable Puts You in Control"

Building on these initiatives, the cable industry announced a comprehensive consumer outreach campaign in March of this year. This initiative, called "*Cable Puts You in Control*," was designed to increase awareness about tools and resources cable provides so that families can make educated decisions about television viewing. It reflects the cable industry's commitment to provide American families a wide variety of programming choices, technology that enables customers to block channels or programs they find unsuitable for family viewing, and resources on media literacy to help families better understand the entertainment and information they receive through media today. Elements of the campaign include a new website, public service announcements and a variety of additional consumer education materials.

a) "Control Your TV" Website

On March 23, Cable in the Classroom launched ControlYourTV.org, a website devoted to empowering parents by providing them with information about how to manage their family's television and media use. Many of the materials created for the "*Cable Puts You in Control*" initiative direct consumers to the website, which serves as a clearinghouse for information about parental control technology, media literacy, responsible television viewing, and other cable resources.

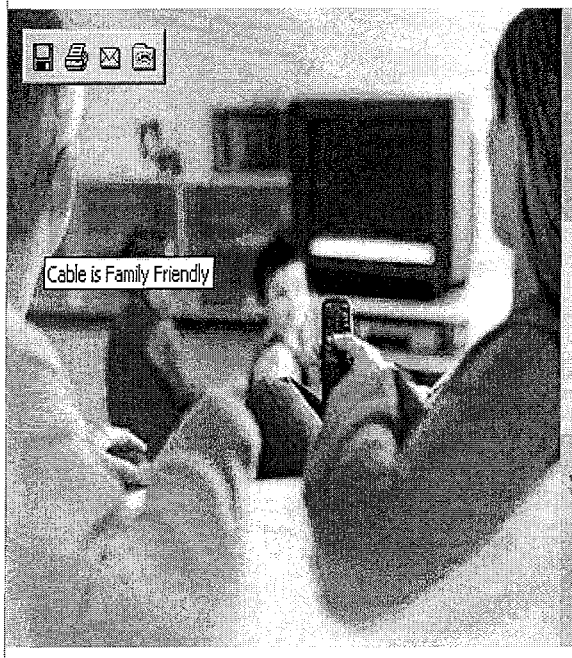
The site highlights some of the diverse children's, educational and family-oriented programming currently available to cable customers. These resources help parents identify programming that meets their family's tastes and interests.

The website also explains the many options available to help families take control of their TV and provides useful information about how to use these tools. For example, a cable customer can find detailed instructions on how to use the parental control features found in cable set-top boxes. The site also contains information that describes what the TV Parental Guidelines mean and how these ratings can be used in conjunction with V-chip-equipped television sets to block unwanted programming.

Finally, the site provides parents and caregivers with information, resources, and tips to help them develop media literacy skills so they can critically evaluate the programs and commercials they see. The cable industry firmly believes that families must be given the tools to educate themselves about all forms of media, including TV, radio, print, video games, and the Internet. A list of organizations that provide additional information about media literacy is also included on the website.

Choice | Control | Education

Cable Puts You in Control



CHOICE

Cable provides a wide range of television programs for all kinds of audiences, including many channels that serve children and families all day, every day.

CONTROL

The cable industry provides parents and caregivers with tools to control and manage the programs that come into their homes.

EDUCATION

The cable industry helps parents and caregivers better understand how to take charge of their childen's use of media.

Site Map | FAQ | For Media

How Can You Control What Your Family Sees on TV?

The cable industry takes seriously concerns about some of the content available on television today and about the impact of media, especially its effect on children. We have a responsibility to participate in substantive efforts to address these issues:

- Cable is committed to offering families the widest possible choice in television programming;
- Cable provides technology that offers parents and caregivers a range of tools to control the programs that come into their homes; and
- Cable educates viewers about how to make good decisions with respect to their children's use of media.

The National Cable & Telecommunications Association has prepared a report with more detailed information about the industry's efforts to offer consumers choice, control and education. Click here to read it.

b) Public Service Announcements

The cable industry is committed to using its own medium to further inform and educate consumers. Therefore, NCTA members have created a series of public service announcements (PSAs) to advise parents about the tools available to help them manage and control the programming that comes into their homes. These PSAs encourage parents to learn how to use these tools and direct them to call their local cable operator or to visit the new ControlYourTV.org website for more information. The spots are available both in English and Spanish.

NCTA has widely distributed the PSAs to cable operators and cable networks across the country. Many NCTA member companies are airing these or similar PSAs during a variety of day parts, including prime time. Between May and the end of August of this year, these spots have run more than 2.5 million times on cable systems across the country and on approximately 40 national and regional cable networks.

c) Customer Education Toolkit

To broaden consumer awareness of cable's parental control tools, NCTA member cable operators are committed to using various means including "bill stuffers," messages on billing statements, company websites, subscriber handbooks, and annual consumer notices. A variety of "template" customer education materials were developed and provided to cable operators and programmers. Cable companies are using these materials to communicate with their customers and viewers about the availability of parental control technology and other tools to manage the television programming that comes into their homes. Cable operators have the ability to customize the materials so they can include important information pertinent to their local cable system.

Some of the customer communications materials provided in the toolkit include:

- A brochure detailing select media literacy tips, and easy-to-understand information on parental controls offered by cable companies, TV ratings and the V-chip. This brochure can be used as a bill insert or stand-alone information tool at community events.[5]
- Training materials to enable customer service representatives and cable technicians to answer customer questions about channel-blocking technology.
- Materials for enhancing the parental control information available on cable operator and network websites.
- Suggested messages for subscriber notices and billing statements that inform customers of parental control technology and provide contact information for obtaining more information.

d) Media Smart Families Workshops

As part of the *Cable Puts You in Control* initiative, Cable in the Classroom and the National PTA are sponsoring a series of Media Smart Families workshops to help parents learn about ways they can manage their family's media diet in positive and proactive ways. These workshops are the newest element in Cable in the Classroom's ongoing collaboration with National PTA on media literacy. Each workshop consists of a 20-25 minute presentation by a speaker from the nationally-known Center for Media Literacy, followed a hands-on session for parents to learn about TV ratings, the V-Chip and cable's parental control options.

* * * * *

In sum, the cable industry is taking the lead in ensuring that parents have the ability to choose programming that they deem to be appropriate for, and not harmful to, their children. In addition, the industry is providing the means for parents to control the programming that is available to their children and to block access to programming that they deem inappropriate and

[5] A copy of the brochure is attached to these comments (Attachment B).

potentially harmful. Finally, the cable industry is taking major steps to educate consumers about how to take advantage of the choice and control that is available to them. In announcing the *"Cable Puts You in Control"* initiative NCTA President and CEO Robert Sachs observed: "No one wants policymakers to have to choose between protecting children or preserving the First Amendment. So if we, as an industry, actively promote the choices and controls available to consumers, there will be no need for anyone to do so."[6]

II. BARRING OR RESTRICTING THE AVAILABILITY OF "VIOLENT" CABLE PROGRAMMING WOULD VIOLATE THE FIRST AMENDMENT.

Giving parents the tools to protect their children from programming that they deem inappropriate or harmful does not, of course, guarantee that parents will, in fact, choose to use them. Even when significant steps are taken to make sure that parents are aware of such tools and know how to use them, many parents simply do not use them. This has caused some members of Congress to ask the Commission to consider whether it has or should be given authority to override parental decision-making and simply bar the provision of violent programming or restrict such programming to a "safe harbor" – *i.e.*, a time period when children are less likely to be watching television.

A. The Commission Has No Current Authority To Restrict or Bar Cable Programming that Depicts Violence.

As a threshold matter, the Commission clearly does *not* currently have authority to adopt such a restriction. Title VI of the Communications Act narrowly circumscribes the Commission's authority to regulate the content of services provided by cable operators. Section 624(f) of the Communications Act provides that "[a]ny Federal agency, State, or franchising

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[6] R. Sachs, "Cable Puts *You* In Control," Remarks to the Cable Television Public Affairs Association Forum, Washington, DC, March 23, 2004 (http://www.ncta.com/pdf_files/RJSCTPAA04.pdf).

authority may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this title.*" 47 U.S.C. § 544(f)(1) (emphasis added). Nothing in Title VI expressly authorizes the Commission to adopt a "safe harbor" requirement or otherwise restrict the provision of "violent" programming.

Congress would have to specifically authorize such regulation. But, for the reasons set forth in the attached analysis by Professor Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law at The University of Chicago,[7] Congress would itself be preempted from taking such action by the First Amendment.

B. Restrictions on Violence in Cable Programming Cannot Meet the Test for Content-Based Regulation of Speech.

The Supreme Court has established a difficult standard for the government to meet when it comes to restricting the availability of speech on the basis of its content. As a general matter, preventing viewers, listeners and readers from receiving certain content can only be justified in the rarest of circumstances. Such restrictions are presumptively invalid, and the government must usually have a compelling reason to overcome this presumption. Moreover, the restriction must be narrowly tailored, and the "least restrictive means," to achieve that compelling objective.[8]

As Professor Stone shows, restricting violent cable programming to a "safe harbor" – an approach that would affect and limit the content that *all* viewers, adults and children, can view during all other hours – cannot meet that test. As an abstract matter, Professor Stone acknowledges that "[s]ociety certainly has 'a compelling interest in protecting the physical and

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[7] G. R. Stone, "The First Amendment Implications of Government Regulation of 'Violent' Programming on Cable Television," attached to these comments (Attachment A).

[8] *See* Stone at 14.

psychological well-being of minors.'"[9] But to demonstrate a compelling interest in restricting specific violent television programming, the government "must affirmatively prove that exposure to violent images poses a direct and serious threat to the social and psychological development of children."[10] And that, according to Professor Stone, is not possible given the ambiguity and imprecision of current research:

> As existing social science reveals, exposure to violent themes and images may have both good and bad effects, depending upon the individual, the context, and the manner of presentation. In light of this prevailing uncertainty, it is impossible to say that the government has a 'compelling' interest in shielding children from violent themes and images.[11]

In any event, even if the evidence were sufficiently clear to give the government a compelling interest in protecting children from depictions of violence, the government would still have to *define* with sufficient clarity the violent depictions that are problematic and subject to regulation. This, according to Professor Stone, would be an insurmountable burden leading to an overly broad and unconstitutional result:

> [T]he evidentiary, analytical, and social science obstacles to defining images that are "excessively violent" or "too violent for minors" are simply overwhelming. . . . [T]he potential harm caused by such images is so idiosyncratic to particular minors, of particular ages, in particular circumstances, that it would be impossible to define such concepts with sufficient clarity to meet the demands of the First Amendment for the regulation of "high" value speech.[12]

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[9] Stone at 14, *quoting Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989), and *citing Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 755 (1996).

[10] Stone at 15.

[11] *Id.* at 15-16, *citing Youth Violence: Report of the Surgeon General* (2001) (*quoted in* NOI, ¶ 6); *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994); *American Amusement Machine Association v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001); *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003).

[12] *Id.* at 16 (*citing Speiser v. Randall*, 357 U.S. 513, 525 (1958)).

Finally, even if the government's interest were compelling *and* even if the definitional problems could be overcome, a "safe harbor" restriction would still fail to pass First Amendment muster: "Even when speech is deemed 'harmful to minors,' 'the objective of shielding children does not suffice' to justify an interference with constitutionally protected expression 'if the protection can be accomplished by a less restrictive alternative.'"[13] As was the case in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), there is an obvious less restrictive alternative to banning or restricting the availability of the particular programming at issue – namely, giving parents the ability to identify and block any programming that they might deem harmful to their children.

The Supreme Court held in that case that "targeted blocking is less restrictive than banning, and the government cannot ban speech if targeted blocking is a feasible and effective means of furthering compelling interests." Targeted blocking *is* such a feasible and effective means. It "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners."[14] It may be, as Professor Stone acknowledges, that not all parents will choose to take advantage of the means available for blocking potentially harmful violent programs. But, as he points out, "[t]he Supreme Court has unequivocally declared . . . that the Government's interest in overriding the judgments of parents in this regard 'is not sufficiently compelling to justify' a significant restriction of constitutionally protected expression."[15]

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[13] *Id.* at 17 (*quoting United States v. Playboy Entertainment Group*, 529 U.S. 803, 804 (2000)).

[14] 529 U.S. at 814-15. *See also Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004); *Sable Communications of California v. FCC, supra; Denver Area Educational Telecommunications Consortium v. FCC, supra.*

[15] Stone at 18 (*quoting Playboy Entertainment Group, supra*, 529 U.S. at 825).

C. Violent Programming Is Not Exempt from Full First Amendment Protection.

If restricting cable availability of violent programming cannot survive the "strict scrutiny" that generally applies to content-based regulation of protected speech, it can only pass First Amendment muster if the violent programming at issue is somehow not entitled to full protection. In fact, some speech is, in some circumstances, afforded a reduced level of protection – but Professor Stone shows that none of these exceptions applies to violent programming on cable television.

For example, while speech that can be expected to lead to violent conduct is sometimes treated as less protected speech that may be regulated, the Supreme Court has never suggested that mere *depictions* of violent conduct may be treated this way. To the contrary, the Supreme Court long ago established that "even material focusing on 'deeds of bloodshed, lust or crime' is 'as much entitled to the protection of free speech as the best of literature."[16]

Nor have depictions of violence ever been treated as tantamount to obscenity. The exclusion from First Amendment protection of depictions of explicit sexual acts, when deemed to be solely appealing to prurient interests and wholly lacking in artistic, social, scientific or political value, and at odds with contemporary community values,[17] reflects a longstanding history of regulation and restriction that predates the Constitution. No similar historical treatment has ever been given to depictions of violence, and, as Professor Stone notes, courts and commentators have consistently rejected the notion that violence should be swept under the definition of obscenity.

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[16] *Id.* at 3 (*quoting Winters v. New York*, 333 U.S. 507, 513 (1948)).

[17] *See, e.g., Miller v. California*, 413 U.S. 15 (1973).

The Supreme Court has, in some circumstances, allowed the government to restrict the availability of sexually explicit material to minors, even though such material might not meet the definition of obscenity with respect to adults. *See Ginsberg v. New York*, 390 U.S. 629 (1968). But, as Professor Stone explains, such regulation of non-obscene material that may be "harmful to minors" is only permissible insofar as it restricts minors from obtaining the material "without appreciably interfering with the constitutional rights of adults."[18] In *Ginsberg*, adults could still obtain adult magazines, although the "behind the counter" restriction upheld in that case barred access to children. The Court has consistently rejected restrictions that aim to prevent harm to children but restrict adults' access to otherwise protected speech.[19]

Finally, regulating violent cable programming is not analogous, from a First Amendment standpoint, to the regulation of "indecent" broadcast programming, which the Supreme Court held was permissible in *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). As Professor Stone explains, the Court's plurality opinion was based on two factors not present in the case of violent cable programming.

First, the speech at issue in *Pacifica* was similar in subject matter, if not as extreme, as obscenity. The "indecent" language that was being restricted by the Commission consisted of "patently offensive references to excretory and sexual organs and activities," which, although not obscene, "surely lie at the periphery of First Amendment concern."[20] As discussed above,

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[18] Stone at 6 (*citing Butler v. Michigan*, 352 U.S. 380, 383 (1957).

[19] *Id.* at 8 (*citing Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004); *Playboy Entertainment Group, supra*, 593 U.S. at 803; *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996).

[20] 438 U.S. at 743.

depictions of violence – even if they might, in some circumstances, be harmful to children – "have never been thought to 'lie at the periphery of First Amendment concern.'"[21]

Moreover, as Professor Stone points out, "whereas Justice Stevens [writing for the plurality] could maintain in *Pacifica* that a narrow restriction on the use of 'indecent language' would not have a significant impact on the content of 'serious communication,' a similar argument cannot be made with respect to restrictions on depictions of violence, which frequently cut to the very core of the message communicated."[22]

Second, Professor Stone points out that the *Pacifica* decision was premised on the special nature of the *broadcast* media: "[Justice] Stevens explained that, unlike other media of communication, in which 'indecent language cannot constitutionally be regulated, broadcasting has traditionally been subject to extensive government regulation.'"[23] And cable television has none of the characteristics that warrant broadcasting's diminished First Amendment protection.

First of all, "the traditional 'scarcity' rationale for the regulation of broadcasting does not exist in the context of cable."[24] Thus, while broadcasting "as a matter of history has 'received the most limited First Amendment protection,'" cable "has no comparable history."[25]

But more importantly, as the Supreme Court held in *Playboy Entertainment Group*, *supra*, there is "a key difference between cable television and the broadcasting media." Unlike broadcasters, "[c]able systems have the capacity to block unwanted channels on a household-by-

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[21] Stone at 12 (*quoting Winters v. New York*, *supra*).

[22] *Id.* (*citing Pacifica*, 438 U.S. at 743 n.18).

[23] *Id.* at 11 (*citing Pacifica*, 438 U.S. at 748-50).

[24] *Id.* at 13.

[25] *Reno v. ACLU*, 521 U:S.844, 867 (1997) (*quoting Pacifica*, *supra*, 438 U.S. at 748) (discussed by Stone at 13).

household basis."[26] And, as Professor Stone explains, "[t]he availability of such targeted blocking renders irrelevant the central premise of *Pacifica*, for in the setting of cable television, unlike radio, "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners."[27] Therefore, "whatever the continuing vitality of Justice Stevens's plurality opinion in *Pacifica* in the context of broadcasting, *it has no force in the realm of cable television*, as the Supreme Court has expressly and repeatedly held."[28]

In sum, regulation of violence in cable programming would be subject to the same stringent standards of First Amendment scrutiny that generally apply to content-based regulation of high-value speech. And efforts to bar such violent content or relegate it to a "safe harbor" could not survive such scrutiny.

CONCLUSION

Because it is so difficult to identify with precision the particular types of "violent" programming that may in particular circumstances be potentially harmful to some children, and because depictions of "violence" are often embedded in programming that is of artistic or newsworthy value to adults (and, in some cases, children, as well), and because parents have the technological means available to prevent their children from viewing violent programs and other material that they may deem potentially harmful, banning or restricting the availability of violent programming would not survive First Amendment scrutiny.

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[26] 529 U.S. at 804.

[27] Stone at 13 (*quoting Playboy Entertainment Group*, 529 U.S. at 815).

[28] *Id.*

The cable industry, however, recognizes the importance to parents and society of ensuring that those means for identifying and blocking programs are available to their customers – and that their customers are aware of them and know how to use them. Cable operators and programmers have devoted substantial resources and effort to developing and deploying the technology and to educate parents about its use. And they are committed to continuing to do so. Finally, the industry remains committed to offering cable customers a broad choice of programming, so that adults can choose programming at any time that meets their own needs and interests but can also select and steer their children to programming that is appropriate for them.

Respectfully submitted,

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ATTACHMENT A

THE FIRST AMENDMENT IMPLICATIONS OF GOVERNMENT REGULATION OF "VIOLENT" PROGRAMMING ON CABLE TELEVISION

Geoffrey R. Stone[*]

I have been retained by the National Cable and Telecommunications Association to offer my independent opinion on the constitutionality of government-imposed regulation of "violent" programming on cable television. My conclusion, in short, is that such regulation is foreclosed by settled principles of First Amendment jurisprudence.

Regulation of speech on the basis of its content is usually subject to the most stringent First Amendment scrutiny and is rarely permissible. As the Supreme Court observed only last Term, because "[c]ontent-based prohibitions . . . have the constant potential to be a repressive force in the lives and thoughts of a free people," the First Amendment "demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality." *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783, 2788 (2004).

Against this background, four separate, but related, rationales have been proposed for overcoming this high barrier with respect to the regulation of violent programming. First, it is sometimes argued that expression emphasizing violent themes or images has only "low" First Amendment value and may therefore be subjected to a broader range of government regulation than other types of expression. The analogy is to obscenity. See *Roth v. United States*, 354 U.S. 476 (1957). Second, it is sometimes argued that expression emphasizing violent themes or images is "harmful to minors" and is therefore

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of "low" First Amendment value for minors. The analogy is to material deemed "obscene for minors." See *Ginsberg v. New York*, 390 U.S. 629 (1968). Third, it is sometimes argued that expression emphasizing violent themes or images is "indecent" for minors and may therefore be "channeled" in ways that minimize the exposure of minors. The analogy is to the regulation of "indecent" material in the broadcast media. See *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). Fourth, it is sometimes argued that the harm caused by violent expression is so grave and so immediate that its regulation is necessary to serve a compelling government interest. There is no apt analogy. None of these arguments can withstand constitutional scrutiny.

I. "LOW" VALUE SPEECH

The Supreme Court has held that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Within this category, the Court includes "the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id* at 572. The Court has explained that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id*.

Some categories of "low" value speech involve violence. This is so, for example, of incitement, fighting words, and threats. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Chaplinsky*, *supra*, (fighting words); *Virginia v. Black*, 538 U.S. 343 (2003) (threats). But each of these doctrines governs a narrowly-defined class of expression,

subject to regulation only under highly constrained circumstances. They do not in any way support the notion that the government may regulate expression merely because it contains "excessively" violent themes and images. To the contrary, the very existence of these narrowly-defined categories of "low" value speech, each of which addresses very specific elements of "violent" expression, makes clear that the very idea of a broad category of "low" value speech defined in terms of its "violent" content is incompatible with longstanding First Amendment principles. Indeed, the Supreme Court has said as much. More than a half century ago, in a statement that has never been called into question, the Court declared that even material focusing on "deeds of bloodshed, lust or crime" is "as much entitled to the protection of free speech as the best of literature." *Winters v. New York*, 333 U.S. 507, 513 (1948).

Taking a somewhat different approach, some advocates have argued that the regulation of violent expression can be brought within the existing obscenity doctrine because some depictions of violence offend "contemporary community standards."[1] These arguments consistently fail, however, for as the Supreme Court has made clear, only "works which depict or describe sexual conduct" can constitute obscenity. *Miller v. California*, 413 U.S. 15, 18, 24 (1973). See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n. 10 (1975); *Video Software Dealers Association v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992); *United States v. Thoma*, 726 F. 2d 1191, 1200 (7th Cir. 1984); *Video Software Dealers Association v, Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004).

[1] See, for example, Kevin W. Sanders, *Violence as Obscenity: Limiting the Media's First Amendment Protection* (Duke University Press 1996).

Other advocates have urged the creation of an entirely new category of "low" value speech designed specifically for violent images, analogizing depictions of violence to obscenity. The notion is apparently that if sexual material is of "low" First Amendment value when it appeals to the prurient interest, offends contemporary community standards, and lacks serious artistic, social, scientific, and political value, then the same should be true for violent material. Courts and commentators have consistently rejected this argument, and rightly so.

When the Supreme Court first articulated the obscenity doctrine in *Roth v. United States*, *supra*, it expressly relied on the long and unbroken history of government regulation of obscene expression, stretching as far back as colonial times. See 354 U.S. at 481-83. This was a critical justification for the Court's conclusion that some graphically sexual expression has only "low" First Amendment value. But there is no similar history of the regulation of violent images. To the contrary, as Professors Thomas Krattenmaker and Scot Powe concluded after thoroughly reviewing the historical record, there is nothing to suggest that the Framers of the First Amendment believed that "depictions of violence . . . could or should be suppressed." Thomas G. Krattenmaker & L. A. Scot Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123, 1199 (1978). See also Ian Matheson Ballard, Jr., *See No Evil, Hear No Evil: Television Violence and the First Amendment*, 81 Va. L. Rev. 175, 194 (1995).

Moreover, whereas the United States has experienced more than two centuries of obscenity regulation, it has no comparable experience with the regulation of violent themes or images. Indeed, the regulation of violent images is virtually unheard of in American history, and there exists no shared understanding of what one might mean by

constitutionally unprotected depictions of violence. "I know it when I see it" has never been a sound basis for First Amendment doctrine. As Judge Richard Posner has observed, the "graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake," the *Divine Comedy*'s "graphic descriptions of the tortures of the damned," and Tolstoy's "graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds" all illustrate that "classic literature and art . . . are saturated with graphic scenes of violence, whether narrated or pictorial." Thus, "[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity." *American Amusement Machine Association v. Kendrick*, 244 F. 3d 572, 575-576 (7th Cir. 2001).

Unlike graphic depictions of sex, graphic images of violence "have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation." *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d at 1185. And this is true to this very day, as *Saving Private Ryan, Schindler's List, Natural-Born Killers*, and the evening news amply demonstrate. The plain and simple fact is that images of violence are a fundamental part of our culture and daily life, and there is no basis in constitutional history or theory for recognizing a new and unprecedented category of "low" value speech merely because of its "violent" content. As the Supreme Court declared in *Winters*, such material is "as much entitled to the protection of free speech as the best of literature." See *American Amusement Machine Association v. Kendrick*, 244 F. 3d at 574-576; *Video Software*

Dealers Association v. Webster, 968 F. 2d at 688; *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199, 204-206 (S.D. Fla 1979); *Sovereign News Co. v. Falke*, 448 F. Supp. 306, 394 (N.D. Ohio 1977). See also Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1520-1525 (1995).

II. "HARMFUL TO MINORS"

A second argument sometimes made to justify the regulation of violent expression is that such speech is "harmful to minors" and is thus of only "low" First Amendment value for *them*. The lynchpin of this argument is the Supreme Court's 1968 decision in *Ginsberg v. New York, supra*, in which the Court recognized that some sexually explicit material that may not be obscene for adults may nonetheless be obscene for minors and that the government may therefore shield minors from such material. It is on this basis that the government may constitutionally prohibit video stores from renting X-rated videos to fourteen-year-olds and may constitutionally prohibit movie theaters from admitting minors to certain films. As long as it is possible to exclude minors without appreciably interfering with the constitutional rights of adults, the Court has upheld such regulations.[2]

But this doctrine has no relevance to the regulation of "violent" expression. The *Ginsberg* principle is premised entirely on the predicate judgment that there exists a category of expression – obscenity – that is itself of only "low" First Amendment value. Once that judgment exists, the next question is whether the *definition* of obscenity may differ for minors and adults. In the context of violent images, however, there is no

[2] As the Supreme Court has repeatedly made clear, however, the government may not "reduce the adult population" to reading or seeing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

predicate category of "low" value speech on which to premise a broader definition of unprotected speech for minors. *Ginsberg* is simply irrelevant.

Although the government surely has a compelling interest in the well-being of minors, and may in appropriate circumstances shield minors from harmful expression, the Supreme Court has made clear that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." Indeed, speech that is "neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-214 (1975). Implementing this principle, courts have consistently rejected the claim that government may constitutionally shield minors from otherwise constitutionally protected themes or images of violence merely because the government thinks such exposure "might do them harm." *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d at 1186. See *Interactive Digital Software Association v. St Louis County*, 329 F. 3d 954, 959-960 (8th Cir. 2003); *Video Software Dealers Association v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992).

There is, in short, no basis for concluding that there is a category of expression that is of only "low" First Amendment value for minors because of its violent content. Furthermore, as Judge Posner has explained, "[t]his is not merely a matter of pressing the First Amendment to a dryly logical extreme." Individuals "are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." For the government to shield minors "from exposure to violent

descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *American Amusement Machine Association v. Kendrick*, 244 F. 3d at 576-577.

Moreover, even if a court were to recognize a new "low" value category of speech because it is "violent for minors" – something no court has ever done – that still would not justify the regulation of such speech on cable television. The concept "obscene for minors," as recognized in *Ginsburg*, is useful in those circumstances in which it is easy to separate adults from minors. Thus, as already noted, under the *Ginsburg* doctrine, government can constitutionally prohibit movie theaters from admitting minors to movies that are "obscene for minors" and video rental stores from renting certain videos to minors. In those circumstances, there is direct, face-to-face contact with the individual, and it is therefore easy to protect the constitutional rights of adults while at the same time shielding minors from material that is obscene for them. It is in these circumstances that *Ginsburg* has its greatest force and effect.

In other contexts, however, when the medium of communication makes it difficult to separate adults from minors, the government cannot constitutionally limit the First Amendment rights of adults in order to prevent minors from seeing material covered by *Ginsburg*. Indeed, the Supreme Court has consistently invalidated government regulations designed to keep minors from accessing such expression when the regulation appreciably interferes with the constitutional rights of adults. See *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004) (upholding preliminary injunction against the Child Online Protection Act, which was designed to prevent minors from seeing material that is "obscene for minors" on the Internet); *United States v. Playboy*

Entertainment Group, 593 U.S. 803 (2000) (invalidating restrictions on "signal bleed" designed to protect minors from seeing sexually explicit images on cable television); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (invalidating provisions of the Communications Decency Act designed to protect minors from seeing sexually explicit material on the Internet); *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996) (invalidating restrictions designed to protect minors from seeing "patently offensive" sexually-related materials on leased access cable channels); *Sable Communications v. FCC*, 492 U.S. 115 (1989) (invalidating restrictions designed to protect minors from telephone dial-a-porn services).

In each of these decisions, the Court made clear that society has a legitimate, indeed, compelling interest in helping parents protect minors from material that is "obscene for children." But in each decision the Court insisted that this goal must be accomplished by "narrowly tailored" regulations that represent the "least restrictive" means of achieving the government's interest. That is, the means must be the "least restrictive" of the First Amendment rights of adults. The Court has consistently held that any effort to restrict material that is "obscene for minors" in these media must focus on enabling individual parents and other adults to decide for themselves what material may and may not enter their homes.

In the context of cable television, this has led to two critical principles. First, the government can constitutionally require cable operators to empower subscribers to block *any* undesired channel or program upon request. Section 504 of the Telecommunications Act of 1996 already embodies such a requirement. Second, the government can

constitutionally promote the development of lockboxes, filters and other devices that enable parents and other adults to screen out *any* material they deem undesirable.

The key to these two principles is that they leave to individual adults, rather than to the government, the decision of what constitutionally protected material will be available in their homes. By requiring the government to act in a content-neutral manner, while at the same time allowing the government to pursue policies that empower parents to decide for themselves what material is appropriate for *their* twelve-year-old, *their* fourteen-year-old, or *their* seventeen-year-old, such policies represent precisely the sort of "narrowly tailored" and "least restrictive" methods the Court has consistently insisted upon. See *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. at 2791-2794; *United States v. Playboy Entertainment Group*, 593 U.S. at 810-826; *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. at 755-759; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983); *Rowan v. Post Office Department*, 397 U.S. 728, 729-730 (1970).

The bottom line, then, is that even in dealing with material that is "obscene for minors," the government cannot *directly* regulate such material on cable television. Rather, it must focus on empowering parents and other adults to block out such material at their own discretion, by ensuring that content-neutral means exist that enable individuals to exclude constitutionally protected material they *themselves* want to exclude. Any more direct regulation of such material would unnecessarily impair the First Amendment rights of adults. And if this is so for material that is "obscene for minors," then it is necessarily so for images of violence. Even in the unlikely event that a court were to recognize a new "low" value category for speech that is "violent for

minors," it would not alter or expand the constitutional authority of government to regulate such expression on cable television.[3]

III. "INDECENCY"

A third argument that has been made for the regulation of violent themes and images on cable television builds on the Supreme Court's 1978 decision in *Federal Communications Commission v. Pacifica Foundation*, *supra*, in which the Court, in a sharply divided set of opinions, held that, in order to protect children from exposure to "vulgar" and "shocking" profanity, the FCC could constitutionally "channel" the times of day during which a radio station could broadcast "indecent" language. In a plurality opinion, Justice Stevens justified this conclusion by focusing both on the similarity between obscenity and indecency and on the special nature of the broadcast media. With respect to the former, Stevens reasoned that, although "patently offensive references to excretory and sexual organs and activities" may not be obscene, "they surely lie at the periphery of First Amendment concern." Indeed, "[t]hese words offend for the same reasons that obscenity offends." 438 U.S. at 743, 746. With respect to the latter, Stevens explained that, unlike other media of communication, in which "indecent" language cannot constitutionally be regulated, broadcasting has traditionally been subject to extensive government regulation. *Id* at 748-750.

Neither of these premises applies to the regulation of violent images on cable television. Whatever else might be said about the depiction of violence, it is not about "excretory and sexual organs and activities." Moreover, unlike profanity, such images do

[3] This is not to say that recognition of such a category would have no impact on other media of communication where it is easier to separate adults and minors, such as movie theaters, bookstores, and video stores.

not "offend for the same reasons that obscenity offends,"[4] and, as *Winters* made clear, they have never been thought to "lie at the periphery of First Amendment concern."

Furthermore, while it is easy to define a list of "dirty words" that may not be broadcast during certain hours of the day, it is next to impossible to define with any clarity the images of war, crime, human suffering, and mayhem that would be "channeled" under a violence-based "indecency" rule. From both an administrative and a First Amendment standpoint, the inherent vagueness of such a concept renders the analogy to profanity implausible. And whereas Justice Stevens could maintain in *Pacifica* that a narrow restriction on the use of "indecent language" would not have a significant impact on the content "of serious communication," a similar argument cannot be made with respect to restrictions on depictions of violence, which frequently cut to the very core of the message communicated. *FCC v. Pacifica Foundation*, 438 U.S., at 743 n. 18. As Judge Robert Bork observed in a different, but related, context, it is essential not to let a "dialectical progression . . . become an analogical stampede." Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 27-27 (1971). Even Justice Stevens went out of his way in *Pacifica* to "emphasize the narrowness of our holding." 438 U.S. at 750. *Pacifica* certainly does not open the door twenty-five years later to the regulation of violent themes or images. See Ballard, *supra*, at 211.

The second premise of Justice Stevens's plurality opinion in *Pacifica* is even more clearly inapplicable to the regulation of violent images on *cable television.* As the Supreme Court observed in *Turner Broadcasting System, Inc. v. FCC*, the "rationale for

[4] Indeed, efforts to regulate violent expression are not based on "offense" at all. They are based on a concern about the impact of the expression on the beliefs, values, and behavior of the audience, which is a different and much more serious First Amendment issue. See *American Amusement Machine Association v. Kendrick*, 244 F. 3d at 574-576.

applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation." 512 U.S. 622, 637 (1994).This is true for several reasons. First, the traditional "scarcity" rationale for the regulation of broadcasting does not exist in the context of cable. Second, whereas the broadcast media "as a matter of history has 'received the most limited First Amendment protection,'" the cable medium "has no comparable history." *Reno v. American Civil Liberties Union*, 521 U.S. at 867, quoting *FCC v. Pacifica Foundation*, 438 U.S. at 748. Third, and most important, there is "a key difference between cable television and the broadcasting media" that cuts to the very heart of *Pacifica*'s application to cable television. As the Court explained in *Playboy Entertainment Group*, "[c]able systems have the capacity to block unwanted channels on a household-by-household basis." 529 U.S. at 804. The availability of such targeted blocking renders irrelevant the central premise of *Pacifica*, for in the setting of cable television, unlike radio, "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id* at 815. Thus, whatever the continuing vitality of Justice Stevens's plurality opinion in *Pacifica* in the context of broadcasting, it has no force in the realm of cable television, as the Supreme Court has expressly and repeatedly held. See also *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985).

IV. "COMPELLING GOVERNMENT INTEREST"

Because *Roth*, *Ginsburg*, and *Pacifica* are all inapt analogies, any effort to regulate violent themes or images on cable television would constitute a restriction of

"high value" speech because of its content.[5] Such content-based restrictions are almost never permissible. Indeed, such a restriction "can stand only if it satisfies strict scrutiny." To withstand such scrutiny, a content-based regulation of speech must be necessary to promote "a compelling governmental interest." Not only must the government's interest be "compelling," but the restriction must be "narrowly tailored" and it must be the "least restrictive means" of achieving the government's interest. *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. at 2791; *United States v. Playboy Entertainment Group*, 529 U.S. at 813; *Reno v. American Civil Liberties Union*, 521 U.S. at 879; *Sable Communications of California v. FCC*, 492 U.S. at 126.

Society certainly has "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California v. FCC*, 492 U.S. at 126. See *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. at 755. Moreover, this concern extends to shielding minors from exposure to harmful expression. As the Supreme Court has observed, "[n]o one suggests that the Government must be indifferent to unwanted . . . speech that comes into the home without parental consent." *United States v. Playboy Entertainment Group*, 529 U.S. at 814.

[5] Because such a regulation would turn expressly on the violent content of expression and would have to be defended in terms of the communicative impact of the speech, it cannot plausibly be characterized as "content-neutral." Just as regulations of "indecent" speech are content-based, so too are regulations of "violent" speech content-based. See *United States v. Playboy Entertainment Group*, 529 U.S. at 813 (regulation of indecent expression on cable television is a "content-based speech restriction"); *Reno v. American Civil Liberties Union*, 521 U.S. at 879 (regulation of indecent expression on the Internet is a "content-based restriction of speech"); *American Amusement Machine Association v. Kendrick*, 244 F.3d at 575 (regulation of violent video games is a "content-based regulation"); *Video Software Dealers Association v. Webster*, 968 F.2d at 689 (regulation of violent video games regulates "speech based on its content"). See also *Winters v. New York*, supra.

But to say that this interest is "compelling" in the abstract is not to say that it is "compelling" in the particular. As Judge Posner has explained in a decision invalidating an ordinance designed to regulate "violent" video games, the mere invocation of the government's interest in protecting children from harm is not "canonical." To demonstrate a "compelling" government interest, the government may not rest casually on "what everyone knows," but must affirmatively prove that exposure to violent images poses a direct and serious threat to the social and psychological development of children. The issue, after all, is not protection from "violence," but protection only from "*images* of violence." *American Amusement Machine Association v. Kendrick,* 244 F.3d at 575, 578.

In its July 28, 2004, *Notice of Inquiry*, the Commission noted that a substantial body of social science research supports the view that excessive "exposure to media violence can be associated with certain negative effects" among minor viewers. But this research remains ambiguous and inconclusive. The Commission quoted approvingly in this regard from the Surgeon General's recent conclusion that "it is not yet possible to describe accurately how much exposure, of what types, for how long, at what ages, for what types of children, or in what types of settings will predict violent behavior in adolescents and adults." *Youth Violence: Report of the Surgeon General* (2001), quoted in Federal Communications Commission, *Notice of Inquiry, Violent Television Programming and Its Impact on Children* 4 (July 28, 2004).

As existing social science research reveals, exposure to violent themes and images may have both good and bad effects, depending upon the individual, the context, and the manner of presentation. In light of this prevailing uncertainty, it is impossible to say that

the government has a "compelling" interest in shielding children from violent themes and images. See *Turner Broadcasting System v. FCC*, 512 U.S. at 664 (when the government regulates speech, it "must demonstrate that the recited harms are real, not merely conjectural"); *American Amusement Machine Association v. Kendrick*, 244 F. 3d at 578-579 (social science data are insufficient to justify the regulation of violent video games for minors); *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, 958-959 (8th Cir. 2003) (social science data are insufficient to justify the regulation of violent images for minors).

Moreover, even if the government's interest in shielding minors from depictions of violence were "compelling," there is no reason to believe that a direct regulation of violent images on cable television could meet either the "narrowly tailored" or "least restrictive means" requirements. With respect to the "narrow tailoring" requirement, the evidentiary, analytical, and social science obstacles to defining images that are "excessively violent" or "too violent for minors" are simply overwhelming. There is no historical basis for such concepts in American constitutional jurisprudence, and the potential harm caused by such images is so idiosyncratic to particular minors, of particular ages, in particular circumstances, that it would be impossible to define such concepts with sufficient clarity to meet the demands of the First Amendment for the regulation of "high" value speech. See *Spieser v. Randall*, 357 U.S. 513, 525 (1958) ("the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn"). This concern, too, is frankly and thoughtfully acknowledged in the Commission's *Notice of Inquiry*.

Finally, and perhaps most important, even if the government has a compelling interest in shielding minors from violent themes and images, and even if it could overcome the definitional obstacles, there are many means by which the government can pursue its interest, and restrictions of high value speech must be a last, rather than a first, resort. This is the essential logic of the "least restrictive method" requirement. Even when speech is deemed "harmful to minors," "the objective of shielding children does not suffice" to justify an interference with constitutionally protected expression "if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entertainment Group*, 529 U.S. at 804. As I have already noted, in the context of cable television the obvious "less restrictive alternative" is blocking. This alternative "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." Thus, "[s]imply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering compelling interests." By the same token, "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id* at 814-815.

The Supreme Court has squarely addressed this question in a series of decisions involving both cable television and the Internet. In *Ashcroft v. American Civil Liberties Union*, *supra*, for example, the Court reasoned that filters are a less restrictive alternative than direct restrictions on the access of minors to "harmful" websites because they "impose selective restrictions on speech at the receiving end, not universal restrictions at the source." 124 S. Ct. at 2786. Thus, "[u]nder a filtering regime, adults without children may gain access to speech they have a right to see," without having their First

Amendment rights impaired. *Id* at 2792. Similarly, in *Sable Communications*, the Court held that the government must rely on a technological approach to controlling the access of minors to "dial-a-porn" messages, and in *Denver Area*, the Court invalidated restrictions designed to shield minors from sexually-explicit images on cable television because §504 of the Telecommunications Act already embodies a "less restrictive alternative" – requiring cable operators to "honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe." 518 U.S. at 756. The same is necessarily true with respect to violent images.

It might be argued, of course, that such alternatives as blocking or lockboxes are not as effective as direct restrictions on "violent" programming, at least within certain hours. After all, there may be parents "who out of inertia, indifference, or distraction, simply would take no action" to block from their children violent or indecent images or programs. *United States v. Playboy Entertainment Group*, 529 U.S. at 825. The Supreme Court has unequivocally declared, however, that the Government's interest in overriding the judgments of parents in this regard "is not sufficiently compelling to justify" a significant restriction of constitutionally protected expression. *Id*. As the Court observed in *Denver Area*, "[n]o provision . . . short of an absolute ban . . . can offer certain protection against . . . a determined child." But this fact is not sufficient to justify "reduc[ing] the adult population . . . to . . . only what is fit for children." 518 U.S. at 759; *Sable Communications of California v. FCC*, 492 U.S. at 128; *Bolger v. Youngs Drug Products Corp*., 463 U.S. at 73; *Butler v. Michigan*, 352 U.S. at 383.

I accordingly conclude that any direct regulation of violent themes and images on cable television would constitute a content-based regulation of high value speech in

violation of the First Amendment. This is not to deny the existence of a legitimate concern. But there are many ways in which the government may address this concern, and it must do so "in a way consistent with First Amendment principles." *United States v. Playboy Entertainment Group*, 529 U.S. at 827.

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ATTACHMENT B

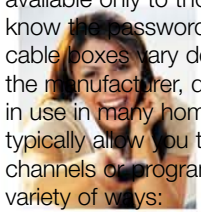
Tips for Choosing TV Programs that are Right for Your Family

ControlYourTV.org

Cable offers great programming choices for each member of your family. But we also understand that not all TV shows are right for all family members. Here are some tips to help you make the right choices. First, decisions about what to watch should be made with the help of a responsible adult. And, if there are channels or programs you don't want your family to see, you have options to control them using parental controls offered by your cable company, the V-Chip in your TV set, and the TV Parental Guidelines ratings system. For more information about how to use these tools, contact your cable company or visit **ControlYourTV.org**.

Using Parental Controls from Your Cable Company

If there are channels or programs you don't want your family or children to see, your cable company gives you options to control your TV using parental controls built right into your cable box. Using a Personal Identification Number (PIN) code as a password, you can block channels (with an analog or digital box) or programs (with a digital box), making them available only to those who know the password. While cable boxes vary depending on the manufacturer, digital boxes in use in many homes today typically allow you to block channels or programs in a variety of ways:



Channel Blocking — You select an individual channel or sets of channels to be blocked at all times unless a PIN password is used.

Time and Date — You select the date, time and channel to block.

TV Ratings — You select programs to block based on their TV rating, also called the TV Parental Guidelines.

If you don't have a cable box, upon your request, your cable company can block channels using an electronic filter, physically installed on the cable equipment outside your home, which "traps" out a particular channel. Alternatively, your cable company may provide you with a set-top box for channel blocking purposes.

TV Ratings and the V-Chip

You can also control the programs your family watches by using the TV ratings in conjunction with the V-Chip — a device found in most newer TV sets — using an on-screen menu of options.

Most programs on cable or broadcast television today carry a TV rating, which appears in the upper left corner of your television screen at the beginning of the show. These ratings, or TV Parental Guidelines, are designed to give you information about the content of television programs and to help you decide if they are appropriate for your family.

For more information about parental controls offered by cable companies, the V-Chip, and the TV Parental Guidelines, contact your cable company or visit **ControlYourTV.org**.

Understanding the TV Ratings

When television programs are "rated," you'll see a certain symbol appear in program listings about the show, and at the start of the program itself. Each symbol includes an indication of the appropriate audience for the program, as described below, and in some cases may include a content label such as "D" for suggestive dialogue, "L" for coarse language, "S" for sexual situations, "V" for violence and "FV" for fantasy violence.

ALL CHILDREN. This program is designed to be appropriate for all children, specifically very young children, including children from ages 2-6.

DIRECTED TO OLDER CHILDREN. This program may be more appropriate for children able to distinguish between make-believe and reality. Themes and elements in this program may frighten children under the age of 7. Parents may wish to consider the suitability of this program for their very young children.

DIRECTED TO OLDER CHILDREN — FANTASY VIOLENCE. For those programs where fantasy violence may be more intense or more combative than other programs in the TV-Y7 category, such programs will be designated TV-Y7-FV.

GENERAL AUDIENCE. Most parents would find this program appropriate for all ages. It contains little or no violence, no strong language and little or no sexual dialogue or situations.

PARENTAL GUIDANCE SUGGESTED. This program contains material that parents may find unsuitable for younger children. The theme itself may call for parental guidance and/or the program may contain moderate violence (V), some sexual situations (S), infrequent coarse language (L), or some suggestive dialogue (D).

PARENTS STRONGLY CAUTIONED. This program contains some material that many parents would find unsuitable for children under 14 years of age. This program may contain intense violence (V), intense sexual situations (S), strong coarse language (L), or intensely suggestive dialogue (D).

MATURE AUDIENCE ONLY. This program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. This program may contain graphic violence (V), explicit sexual activity (S), or crude indecent language (L).

Building a Plan for Your Family's TV Use

Television can be an exciting window on the world, but without guidelines or instructions about how to interpret messages, children may be exposed to programming that is confusing, frightening, or otherwise inappropriate. One solution, according to a recent report, is for parents and other caregivers to work with their children to develop their own comprehensive family media plan, including TV viewing. *Navigating the Children's Media Landscape: A Parent's and Caregiver's Guide,* recommends that families consider what effects their family media use practices can have on their children and provides ideas for helping parents and caregivers select and use age-appropriate media resources. The *Guide,* released by the National PTA and Cable in the Classroom, the cable industry's education foundation, recommends that families take the following steps to create their own family media plan:

- ▲ Identify your current family media practices
- ▲ Consider the unique stages and needs of your children
- ▲ Educate yourself about the children's television and media landscape
- ▲ Select television programs and other media for your family with purpose
- ▲ Encourage active, creative, and open-ended use of media
- ▲ Teach your children media literacy skills.

For more information, or a copy of the report *Navigating the Children's Media Landscape: A Parent's and Caregiver's Guide,* visit ciconline.org or ControlYourTV.org.

Control
at Your Fingertips

ControlYourTV.org